.FO 1

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1344 of 1993

With

CRIMINAL APPEAL No 96 of 1994

With

CRIMINAL APPEAL NO. 165 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE

and

Hon'ble MR.JUSTICE H.R.SHELAT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? - YES

JJJ

2. To be referred to the Reporter or not? - YES

JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ

3. Whether Their Lordships wish to see the fair copy of the judgement? - NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - NO

5. Whether it is to be circulated to the Civil Judge? - NO

PATEL HIMAT MOHANBHAI

Versus

STATE OF GUJRAT

Appearance:

1. Criminal Appeal No. 1344 of 1993

MR AD SHAH for Appellant

MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Respondent

2. Criminal AppealNo 96 of 1994

MR KIRIT RAWAL for Appellant

MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Respondent

3. Criminal Appeal No. 165 of 1994

MR. S.T.MEHTA, LD.PUBLIC PROSECUTOR for Appellant

Mr. A.D. SHAH, Ld. Counsel for Respondent.

CORAM : MR.JUSTICE S.D.DAVE and
MR.JUSTICE H.R.SHELAT
Date of decision: 19/08/96

CAV COMMON JUDGEMENT

Per: Dave, J:-

Criminal Appeal No. 1344 of 1993 has been filed by the original accused No.2, who has been convicted for the commission of the offence punishable under Section 201 I.P.Code. The Criminal Appeal No. 96 of 1994 has been filed by the original accused No.1, who has been convicted for the commission of the offences punishable under Section 302, 364, 404 and 201 I.P. Code. The Criminal Appeal No. 165 of 1994 has been filed by the State because they are aggrieved and dissatisfied with the orders of acquittal- qua the original accused No.2 of other offences for which the accused no.1 has been found guilty. These three appeals, arising from one and the same judgment of conviction and sentence have been heard together and shall be decided and disposed of by the present orders under the Common Judgment.

Two accused persons, namely Nagjibhai Patel and Himatbhai Patel were tried for the alleged commission of the offences punishable under Section 302, 364, 201 and 404 read with Section 114 I.P.Code, on the accusation that, on March 13, 1993 at about 9.00 p.m. they had abducted deceased Nareshbhai Valjibhai Patel with a view to take away the golden chain of the value of Rs.8500-00 at Village, Chogath under the Umrala Taluka of the Bhavnagar District, and later on the accused no.1 had given him dharia blows, which had resulted in to his death. It was also the case of the prosecution that the golden chain belonging to the deceased was removed from over the dead body and later on, with a view to destroy the evidence of the commission of the offence of murder, the accused persons had buried the dead body of the deceased in the outskirts of Village Chogath. This case of the prosecution becomes apparent while reading the charge at Exhibit - 3.

The case of the prosecution is that, Nareshbhai Patel used to stay at Surat and used to run a medical store there in company of his brother. The deceased had gone to village Chogath on March 11, 1993 with a plan to stay there for a period of ten days, so that the Satsang of a Swamiji which had already commenced in the village could be attended by him. On March 13, 1993, Naresh had attended the Satsang but had not returend to his house,

and therefore on the next day the members of the family were in his search. The elder brother of the deceased, namely, Ghanshyambhai who was staying at Surat was also called. Ghanshyambhai in his turn had made every efforts to trace the deceased, but having failed in his pursuits he had informed the police, on 16th March 1993. On the very same day at about 4 to 5 p.m. the members of the family in anxiety were waiting at the house of the deceased and at that time PW - 5 Rasikbhai, Exhibit - 22 and PW - 6 Dineshbhai, Exhibit - 35 had approached them and had informed them that, the accused no.1 had confessed before them that the deceased has been murdered by himself and Nagjibhai, and that the dead body has been buried at the outskirts of the village. It appears that the village people, including the members of the family of the deceased had gone to the spot of the burial and later on police was informed. A formal complaint came to be filed before Umrala police on 17th March 1993 at about 8.30 p.m. The offences came to be registered against the appellants accused. They were later on apprehended. It is the case of the prosecution that, during the investigation there was a confession before the learned JMFC, Vallabhipur-Umarala by the accused No.2 Himatbhai Patel. Certain discoveries were also made and later on the accused persons were charge sheeted. The charge at Exhibit - 3 to which a reference has been made earlier came to be denied by the appellants accused. Placing reliance upon the evidence on record, the learned Addl. Sessions Judge, Bhavnagar, vide his judgment of conviction & sentence dated October 30, 1993 has convicted and sentenced the appellants accused. It is therefore that the present appeals have been filed by the two accused persons and by the State.

Learned counsel Mr. A.D.Shah, who appears on behalf of the original accused No.2 in Criminal Appeal No. 1344 of 1993 has urged that, the entire case of the prosecution hinges upon two confessions, one a judicial confession and the other one an extra judicial and certain alleged discoveries and circumstances, but that, reading of the evidence as a whole would go to show that no reliance could have been placed upon the prosecution evidence. Learned counsel Mr. Kirit Rawal who appears on behalf of the original accused no.1, the appellant in Criminal Appeal No. 96 of 1994 while adopting the arguments advanced by the learned counsel Mr.Shah has urged that, there is absolutely no evidence upon the basis of which the original accused no.1 could have been convicted and sentenced. Replying the above said contentions coming from the learned counsel for the appellants and buttressing the case of the State, learned

Government Counsel Mr.S.T. Mehta has urged that, both the above said appeals filed by the appellants require to be dismissed, but the appeal filed by the State requires to be allowed, by saying that; original accused No.2 is also guilty of the offences punishable under Section 302, 364 and 404 I.P.Code.

At the out set, it shall have to be appreciated that, the case of the prosecution really, as pointed out by learned counsel Mr. Shah hinges upon four branches of evidence, namely (i) a judicial confession, (ii) an extra judicial confession, (iii) the alleged discoveries, and (iv) certain circumstances. With a view to appreciate the contentions coming from learned counsels for the appellants and learned Government Counsel Mr. Mehta, the scrutiny of the prosecution evidence appears to be necessitous.

Firstly taking up the case of the prosecution regarding the judicial confession, the reference requires to be made to the oral testimony of PW - 10 Sureshchandra Tanna, Exhibit - 40, who at the relevant time was working as a JMFC at Vallabhipur-Umarala. According to the evidence tendered by him before the Court, the police had forwarded the accused so that his confessional statement under Section 164 Cr.P.C. could be recorded by him. According to learned Magistrate Mr. Tanna, he had asked the accused to appear before him on the next day and that when he had appeared before him on the next day he was given some time. Learned Magistrate says in his evidence that, the accused No.2 Himatbhai Patel had given a confession before him which came to be recorded by him. The said confession has been presented before the Sessions Court at Exhibit - 41 A. Learned Magistrate Mr. Tanna has said that, he had made it clear to the accused No.2 that, under the law he was not bound to make any confession before him and that, if he prefers to make such a confession, the same could be utilised against him. Learned Magistrate says further that, despite this cautioning, accused No.2 had given the confessional statement which came to be recorded by him, which is at Exhibit - 41A. Thus the learned Magistrate who has recorded the confessional statement of the original accused No.2 makes it abundantly clear that the exercise performed by him was a double faceted one in as much as, he has made it abundantly clear, before the accused No.2 that, he was not bound to make a confessional statement and secondly that, if he make such a statement, the same could be utilised against him as the evidence. During the cross examination the learned Magistrate admits that when the accused No.2 was brought to him on the previous

day he had told him to come on the next day and that, except this nothing had transpired between him and the accused No.2.

Because of the above said evidence tendered by the learned JMFC, Mr.Tanna, there is the contention coming from the learned counsels for the appellants that the above said confessional statement cannot be said to be a genuine confessional statement which could be taken into consideration. The reliance is sought to be placed upon the Supreme Court decision in case of Shivappa, Appellant Vs. State of Karnataka, Respondent, Crimes, 1995(1), page-138 (AIR 1995 S.C. page 980). The Supreme Court has made it abundantly clear that the administration of the caution to the accused that he was not bound to make a statement and that, if he did make a statement, that may be used against him as evidence would not be sufficient. The Supreme Court says that, the Magistrate must disclose to the accused that he was a Magistrate and that the confession was being recorded by him in that capacity. The Magistrate is also required to inquire as to whether the accused has been influenced by anyone to make any such confession. The Magistrate also would be required to lend assurance to the accused that he would not be sent back to police custody in case he did not make the confessional statement. The Magistrate recording the confessional statement also should question the accused as to why he wanted to make the confession or as to what had prompted him to make the confession.

The whole picture, regarding the exercise which according to Supreme Court is required to be performed by a Magistrate recording the confessional statement under Section 164 I.P. Code, becomes clear from what the Supreme Court has said at para-7 of the judgment.

With a view to be specific and succinct in our say, we prefer to extract the entire paragraph from the pronouncement of the Supreme Court, which runs thus:-

" 7. From a perusal of the evidence of P.W.17, Shri Shitappa, Addl. Munsif-Magistrate, we find that though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but P.W.17 did not disclose ot the appellant that he was a Magistrate and that the confession was being recorded by him in that capacity nor made any enquiry to find out whether he had been

influenced by any one to make the confession. P.W.17 stated during his deposition in court "I have not stated to the accused that I am a Magistrate" - and further admitted "I have not asked the accused as to whether the police have induced them (Chithavani) to give the statement". The Magistrate P.W.17 also admitted that "at the time of recording the statement of the accused no police or police official were in the open Court. I can not tell as to whether the police or police official were present in the vicinity of the Court". From the memorandum prepared by the Munsif Magistrate P.W.17 as also from his deposition recorded in court it is further revealed that the Magistrate did not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector Shivappa Shanwar P.W.25 admitted that the sub jail, the office of the Circle Police Inspector and the Police Station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub jail, as ordered by the Magistrate on 21.7.1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22.7.1986 before the Magistrate. That apart, neither on 21.7.1986 nor on 22.7.1986 did the Munsif Magistrate P.W. 17 question the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif Magistrate P.W.17 did not make any serious attempt to ascertain the voluntary character of the confessional statement. The failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement of the appellant recorded under Section 164 Cr.P.C. was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the

> confessional statement of the appellant. Under these circumstances, the confessional statement was required to be ruled out of consideration to determine the guilty of the appellant. Both the trial court and the High Court, which convicted the appellant only on the basis of the so called confessional statement of the appellant, fell in complete error in placing reliance upon that statement and convicting the appellant on the basis thereof. Since, the confessional statement of the appellant is the only piece of evidence relied upon by the prosecution to connect the appellant with the crime, his conviction cannot be sustained. "

When the evidence of learned Magistrate Mr. Tanna at Exhibit - 40 is referred, it is abundantly clear that, he had, of course, cautioned the accused No.2 that he was not bound to make any confession and that, if he prefers to make any confession before him, the said could be utilised against him as the evidence. But, excepting this, the learned Magistrate has not done anything more. He has not preferred to perform the entire exercise as pointed out by the Supreme Court in detail in the above quoted paragraph. It could not be urged that Mr. Tanna had made it clear before the accused No.2 that he was a Magistrate and that the confession was being recorded by him in that capacity. Mr. Tanna has also not made any inquiry to find out whether the accused no.2 had been influenced by any one to make the confession. Mr. Tanna has also not made it sure as to whether the police had induced the accused No.2 to give the statement. It was also not assured to accused No.2 that he would not be sent back to police custody, in case he did not make the confessional statement. In the same way the learned Magistrate had not questioned the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession. Thus, it appears that the learned Magistrate has not performed the requisite exercise for recording a confessional statement as pointed out by the pronouncement of the Apex Court and that, he had satisfied himself, only by cautioning accused No.2 that, he was not bound to make any such confessional statement and that; if he prefers to make any such statement the same could be utilised against him in evidence.

Because of this infirmities, in our opinion no reliance whatsoever could have bene placed upon the said confessional statement at Exhibit - 41A which later on

during the examination of the said accused under Section 313 of the Cr.P.C. 1973 came to be retracted by him.

If the confession made by the accused No.2 before the learned JMFC Mr. Tanna is taken out of the zone of consideration, the emphasis shall have to be on the scrutiny of the evidence tendered by the prosecution to show that, there was an extra judicial confession made by the accused in this respect.

Before going to the evidence of two witnesses, PW -5 Rasikbhai Exhibit -22 and, PW -6 Dineshbhai, Exhibit 35 in whose presence the alleged extra judicial confession came to be made by the accused, a reference requires to be made to the evidence of complainant Gordhanbhai PW-1, Exhibit - 15. According to him two witnesses Rasikbhai and Dineshbhai had approached him with the information that the accused No.2 has told them that, they have murdered the deceased and that, the dead body is lying buried in the field. According to complainant Gordhanbhai, meanwhile the village people had come there in company of the two accused persons and they had shown the spot where the deceased was lying buried. But this later say of complainant Gordhanbhai appears to be a clear afterthought and an addition to his original case before the police, because this important version in respect of the accused persons showing him and the village people the spot where the dead body was found to be buried, was not given to the police in the FIR. When a reference is made to the FIR at Exhibit - 16, it is abundantly clear that no such mention has been made therein. When complainant Gordhanbhai was confronted with this situation, he has in fact admitted candidly before the Court that, he has not stated in the FIR before the police that both the accused persons were in their company when they had gone to the spot where the dead body was lying buried, and that, the accused persons had shown them the spot. He has also stated in his evidence that he does not know as to who had shown the spot to the police. Therefore, before proceeding ahead to examine the evidence of two witnesses, namely, Rasikbhai and Dineshbhai, it shall have to be noticed that the say that the two accused persons were present and they had shown the spot, is clearly an afterthought and that, in all probability, this afterthought had generated with a view to connect the accused persons with the commission of the crime.

Going to the evidence of PW - 5 Rasikbhai at Exhibit - 22, it appears that he and Dineshbhai, the other witness had taken Himatbhai the accused No.2 in

confidence and had promised that if he tells the truth nothing is going to happen to him. The say of Rasikbhai further is that, Himatbhai the accused No.2 had asked for a further safety and safeguard by saying that, if he comes out with the correct information nothing should happen to him. Rasikbhai says that, upon such an assurance, Himatbhai had made the extra judicial confession before them by saying that, the accused persons had decided to keep the deceased in their custody and to ask for a heavy ransom from his father. Rasikbhai further says that the accused No.2 had confessed before them, further that, they were going towards the field but at that time accused No.1 Nagjibhai had taken a dharia and later on Nagjibhai had given dharia blows to the deceased Nareshbhai. The say of Rasikbhai further is that, Himatbhai the accused No.2 had further told them that later on they had gone in the Satsang of the Swamiji but later on Nareshbhai was buried. During the cross examination, the witness has denied the suggestion that he had not stated before the police that while they were on the way Nagji had taken a dharia. He has also denied the suggestion that in his statement before the police he had not stated that village people had gone to the spot of the occurrence in company of the two accused persons. But when this evidence is read along with police evidence, it appears very clearly that Rasikbhai is not justified in saying so. There are the above said two contradictions in his evidence.

P.W - 6, Dineshbhai, Exhibit - 35 has stated that they had called Himatbhai, the accused No.2 at the factory of previous witness Rasikbhai and on inquiry, at the first instance, the accused No.2 was not prepared to admit anything, but later on he was taken in confidence and he was assured that nothing would happen to him. It is further the say of Dineshbhai that Himatbhai had asked for a specific assurance that, nothing would happen to them and had later on given the extra judicial confession by saying that, accused no.1 Nagjibhai had murdered the deceased with dharia and later on the dead body came to be buried by both the accused.

Therefore, when the evidence of witness Dineshbhai is scrutinised, it is eloquently clear that the accused No.2 Himatbhai was called at the factory of witness Rasikbhai and at the initial juncture he had not agreed to his complicity in the crime. Later on he was taken in confidence by Rasikbhai and Dineshbhai and he was further assured that, nothing is going to happen to him. In his turn accused no.2 had asked for a further assurance that nothing should happen to him and only

thereafter the confession was made.

Assailing the above said extra judicial confession, learned counsels for the appellants accused have urged that, because Rasikbhai happens to be the master of the accused no.2 Himatbhai, who was working in his factory and because the inducement was given, the statement made by the accused appears to be clearly hit by Section 24 of the Evidence Act. Learned counsels in this respect have placed reliance upon the Supreme Court decision in Satbir Singh and another etc. etc., Appellants v. State of Punjab, Respondent, Air 1977, S.C. page-1294. This decision of the Supreme Court makes it clear that in deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. The Supreme Court pronouncement brings in limelight the facts of the case. In that case Mr. Kapur had said to the accused on July 17, 1970, that " now that the case has been registered they should state the truth. " The Supreme Court says that, it would be difficult to hold that by this statement Mr. Kapur would not generate in the minds of the accused, some hope and assurance that if they told the "truth" they would receive his support. In the case on hand, as pointed out by us earlier, Rasikbhai was a person in authority. The accused no.2 Himatbhai was called to his factory. The said accused was not prepared to make any confession. He was induced to make a confession by assuring that, nothing is going to happen to him. The accused no.2 having not satisfied with this assurance had asked for a clear-cut assurance that nothing should, in fact, happen to him if he gives the information. Thus, it appears that the confession of the accused no.2 Himatbhai came before the said two witnesses, under a process during which a first juncture assurance was given, a further assurance was asked for and it was also given. It is therefore abundantly clear that, no reliance whatsoever could have been placed upon the above said extra judicial confession allegedly made by the accused no.2 before the said two witnesses.

One more aspect which requires to be kept in mind while coming to the above said conclusion is that, exhibit - 45 the arrest panchanama goes to show very clearly that the accused no.2 Himatbhai was having certain injuries on his person, which could have been caused by a hard & blunt substance. It is therefore clear that before the above said extra judicial

confession allegedly, could be made by the said accused in presence of two prosecution witnesses, he was manhandled and belaboured. This is also a fact arising from the prosecution evidence which could not and should not be ignored while considering the voluntary nature of the confession. We must say that because of all these, we are not inclined to place any reliance upon the so-called voluntary extra judicial confession.

The Supreme Court pronouncement in Pyare Lal Bhargava, Appellant v. The State of Rajasthan, Respondent, A.I.R. 1963 S.C. pg. 1094 makes it abundantly clear that, under Section 24 a confession would be irrelevant, if it should appear to the court to have been caused by any inducement, threat, or promise. According to the Supreme Court, the crucial word is the expression " appears ". The Supreme Court says that the said word " appears" would mean "seems". The Supreme Court ultimately points out that, if on the evidence and the circumstances in a particular case it may appear to the Court that there was threat, inducement or promise, it would not be considered as a confession made by the accused voluntarily.

The Court below, has believed the evidence of discovery as laid by the prosecution. The discovery has been taken as a supporting circumstance upon which the conviction of the appellant accused could have been based. Learned counsels for the appellants have urged before us that, the bare reading of the evidence tendered by the prosecution witnesses, i.e., the panchas in question, it is apparent that the above said find cannot be said to be the discovery, but at the most it could be taken as the recovery. Firstly, there is evidence of P.W No. 12 Shamjibhai Ravjibhai, Exhibit - 42. Shamjibhai states that he was called as a Panch on 18th March 1993 in company of panch no.2 Laljibhai. According to him they had gone to a field belonging to one Devjibhai Patel and had seen a pit with blood stained soil and human hair. The above said articles were seized and the panchanama was completed, which is at Exhibit - 43. Panch witness Shamjibhai has stated further that, later on they had gone to the house of accused no.2, along with the police people, in a jeep car and that the said accused had discovered his garments. The panchanama in this respect is at Exhibit - 44. When the reference is made to this two panchanamas at Exhibit - 43 and 44, it is clear that the first appears to be a panchanama of the scene of occurrence, while the second one is styled as a discovery panchanama. Exhibit - 43 is of no assistance to the prosecution because by then, the village people

knew well that the dead body was recovered from the field belonging to Devjibhai Patel. So far as Exhibit - 44 the panchanama under which the garments of the accused no.2 came to be allegedly recovered loses the significance of a discovery panchanama, regard being had to the say of panch witness Shamjibhai at Exhibit -42. This witness does not say that the accused no.2 had said that he was the author of the concealment and that he would discover the garments and later on he had discovered the same. Because of this evidence, it cannot be said that there was a discovery in respect of the garments of the accused no.2. Exhibit - 42 is the panchanama under which allegedly the golden chain and the weapons utilised in the commission of the offence came to be discovered. Panch witness Manubhai Nanjibhai has been examined at Exhibit 47. The panch witness has said that, he had gone to the house of accused no.1 and later on the said accused had discovered the golden chain and later on two weapons, namely the dharia and the axe came to be discovered from the house. Manubhai also does not say that accused no.1 Nagjibhai had said that he was the author of the concealment and that he had shown his willingness to discover the muddamal weapons and the golden chain. On the contrary, panch witness Manubhai makes it abundantly clear, by saying that, he and the other panch, Yunus were informed by the police that accused no.1 Nagjibhai admits certain things and that he would show certain muddamal lying at certain place. This evidence therefore also cannot be said to be the discovery evidence under which the muddamal weapons and the golden chain came to be discovered. It requires to be appreciated that, though the dharia is said to have been stained with blood, there is absolutely no evidence showing that it was stained with human blood and that the blood group was the same as that of the deceased. Naturally, therefore, no reliance could have been placed on this evidence by saying that the accused persons had discovered certain things including a blood stained weapon. The contention in this respect therefore coming from learned counsels for the appellants require to be accepted.

Learned Government Counsel Mr. S.T.Mehta has urged with vehemence that atleast two circumstances borne out from the evidence would show that the accused persons were guilty of the charges levelled against him. The first circumstance, according to learned Government Counsel is that the two accused persons had shown the spot where the dead body of the deceased was lying buried in the field. While making a reference to the evidence of complainant Gordhanbhai, PW-1, Exhibit - 15, we have

pointed out that, Gordhanbhai- the complainant had not said so, at the initial juncture. Gordhanbhai has admitted in no uncertain terms that he had not stated in the complaint Exhibit - 16 that when he and the village people had gone to the place where the dead body was found to be buried, the two accused persons were in their company. He has also further stated that, he had not said before the police that, two accused persons had taken him and the village people on the spot where the dead body was found to be buried. Thus, it is clear that the say of Gordhanbhai at Exhibit - 15 regarding the two accused persons showing the spot where the dead body was lying, is clearly an after thought and could not be accepted as a circumstance, against the accused persons.

Learned Govt. Counsel Mr. Mehta has also urged that the discovery of the garments and golden chain would be a strong circumstance against the accused. But, while examining the question regarding the alleged discovery of the said articles we have made it clear that, the discovery evidence does not inspire confidence and at any rate, the find cannot be said to be a discovery. Naturally therefore, this evidence cannot be taken as revealing the discoveries, at the hands of the accused persons, which would be a circumstance against them.

Learned Govt. Counsel Mr. Mehta has urged that, the deceased Nareshbhai had gone to the pan shop of one Makodbhai and at that time Nagjibhai had gone there and had called the deceased in his company. The reliance in this respect is sought to be placed upon the evidence of Makodbhai, P.W. - 7, Exhibit - 36. He has stated that, on the date of the incident, Nareshbhai had been to his pan-galla and that, when he was there on the pan-galla talking with him, Nagjibhai the accused no.1 had come there and had called Nareshbhai. Witness Makodbhai further says that he does not know as to where Nareshbhai had gone thereafter. During the cross examination Makodbhai has stated that, he does not remember the date on which the above said "incident had taken place on his pan-galla." Therefore the evidence tendered by Makodbhai would not say that the deceased was called by accused no.1 on that fateful day. The evidence therefore would not lend support to the case of the prosecution that the deceased was found to be in company of accused no.1 for the last time.

The law regarding the case hinging upon the circumstantial evidence is well settled. The Supreme Court pronouncement in Akhilesh Hajam , Appellant V. State of Bihar, Respondent, 1995 SCC (Cri) 883,

reiterates the position by saying thus :-

"... It may be stated that that the standard of proof required to convict a person on circumstantial evidence is now well settled by a series of pronouncements of this Court. According to the standard enunciated by this Court the circumstances relied upon by the prosecution in support of the case must not only be fully established but the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt of an accused is to be inferred, should be of conclusive nature and consistent only with the hypothesis of guilt of the accused and the same should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime. "

Here, as indicated by us, the showing of the spot by the accused persons where the dead body was lying is not established. In the same way it is not established that the deceased was seen last in the company of the accused no.1. The evidence regarding the find of the muddamal chain cannot be said to be of discovery. The muddamal dharia allegedly recovered by the police would not show the human blood on it. This evidence therefore would not stand the test as pointed out by the Supreme Court in case of Akhilesh Hajam (supra). This so-called circumstancial evidence, therefore, also could not have been used to base the conviction of the appellants accused.

One more decision which requires a reference is the Supreme Court decision in case of Chandrakant Chimanlal Desai, Appellant v. State of Gujarat, Respondent, 1992 SCC (cri) pg. 157. The Supreme Court has, with approval, quoted the earlier say of the same Court in Kashmira Singh v. State of M.P., thus :-

" The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used

> in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it.If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. "

Here, as pointed out, there is no evidence on the basis of which, it could be said that the judicial confession requires to be utilised in aid. Moreover, we are not inclined, as made clear by us earlier, to accept the judicial confession as a valid confession. Necessarily therefore we are faced with a case in which there is no other evidence and there is no confession.

On the appreciation of the prosecution evidence, therefore, we shall have to say that the Court below has committed an error in convicting the appellants accused. Both the appeals filed by them against the conviction therefore require to be allowed. We order accordingly. Criminal Appeal No. 1344 of 1993 and Criminal Appeal No. 96 of 1994 stand allowed. Both the appellants are hereby acquitted of the charges levelled and said to have been proved against them. Fine, if any, paid shall be refunded. They shall be set at liberty forthwith if not required in any other criminal case or proceedings. The appeal filed by the State, namely Criminal Appeal No. 165 of 1994 fails and the same is hereby dismissed.

Before parting, we must say that the hearing of these Appeals has shown, both the investigation and the conduct of the trial, falling short of the expected levels. The investigation could have been more realistic. The evidence could have been recorded, in a better fashion. The Exhibits could have been given with care and precision. We would like the Registry to transmit a copy of this paragraph to the learned Trial Judge, at his present station.

******